NO. 11048

In the United States Circuit Court of Appeals

For the Ninth Circuit

E. H. CLARKE LUMBER COMPANY,
an Oregon Corporation,
Appellant,
vs.
P. N. KURTH,
Appellee.

REPLY BRIEF OF APPELLANT, E. H. CLARKE LUMBER COMPANY TO BRIEFS OF APPELLEE AND THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION

ANSWER OF CROSS APPELLEE TO BRIEF OF CROSS APPELLANT

Upon Appeal from the District Court of the United States for the District of Oregon.

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While placed within different frames and presented from varying positions, the brief of Appellee and that of the Administrator of the Wage and Hour Division raise substantially identical objections to the constitutionality of Chapter 265, Oregon Laws of 1943.

It is noteworthy that each admits that inasmuch as the Fair Labor Standards Act does not prescribe any period

of limitations for suits by employees, the applicable valid state statute of limitations governs (Administrator's Br. p. 4, Appellee's Br. p. 4).

The arguments of both revolve around the focal charge that the Oregon Legislature intended to discriminate against rights created by Federal law, and that such an action would be unconstitutional. The Administrator contends that based upon this assumption, the Act falls within the ban of Article VI of the United States Constitution declaring the Constitution and laws of the United States the supreme law of the land.

Again when it is charged that the Oregon statute interferes with the regulation of interstate commerce, it is urged once more that the action was aimed at federal rights. The bases of the arguments presented by Appellee on these points are the same. We submit that they are without foundation.

The Administrator, to support his position, refers to an article published in 1944, after the enactment of the law, in the trade publication "Automotive News of the Pacific Northwest". The Administrator assumes to read in retrospect the minds of the Oregon Legislators when they considered and adopted this law. He claims to know that the Oregon Legislators intended to take away from employees rights given by the federal government under the guise of enacting a statute of limitations. He asks the Court to transgress upon forbidden fields.

In *Stephenson v. Binford,* 287 U. S. 251, 276, 77 L. Ed. 288, 301, involving the use of public highways by contract

carriers, the Court ruled that the state, which owned the highways, could require those using the highways for profit to comply with the regulatory features of the law. But, it was urged that the motive of the state legislature was not to control the use of public highways but some secret, ulterior purpose. To this charge the Supreme Court answered:

> "If the legislature had other or additional purposes, which, considered apart, it had no constitutional power to make effective, that would not have the result of making the act invalid."

This doctrine, based upon the doctrine of separation of powers, was adhered to and clearly applied in *Sonzinsky v. United States,* 300 U. S. 506, 517, 81 L. Ed. 772, 775. The defendant, convicted of dealing in firearms without paying the tax required by the National Firearms Act, contended that the statute was unconstitutional as Congress actually intended to suppress trade in firearms, a power which it lacked, and not to levy a tax, a power admittedly possessed by Congress. The Court bluntly rejected his argument. Said the Court:

> "Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts. (Citing cases.) They will not undertake by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution."[1]

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(1) These principles likewise were applied in,
United States v. Darby, 312 U. S. 100, 115, 85 L. Ed. 609, 617;
Ellis v. United States, 206 U. S. 246, 256, 51 L. Ed. 1047, 1053;
Hampton Jr. & Co. v. U. S., 276 U. S. 394, 412, 72 L. Ed. 624, 631;
Calder v. Michigan ex rel Ellis, 218 U. S. 591, 598, 54 L. Ed. 1163, 1167;
Arizona v. California, 283 U. S. 423, 455, 75 L. Ed. 1154, 1166.

Apart from these considerations, the charge of discriminatory action by the Oregon Legislature cannot be supported upon the facts. As we pointed out in our Opening Brief, there are in Oregon several statutes requiring or authorizing the payment of overtime pay. Two of these, O.C.L.A., Secs. 102-323 and 102-502, are recognized by the Administrator. In addition such pay is authorized by the statute creating the Wage and Hour Commission of Oregon and authorizing it to fix wages and working conditions for female and minor employees, O.C.L.A., Sec. 102-323. Pursuant to the provisions of this last mentioned statute, the Wage and Hour Commission has issued numerous regulations requiring the issuance of working permits and requiring the payment of overtime.

The Oregon Legislature knew of the existence of those statutes. It is true that those statutes had been in effect for years and, the legislature did not deem that a statute of limitations, applicable to suits to recover overtime, was needed. However, with the advent of the Fair Labor Standards Act, the evils arising under those statutes were brought to the foreground. The Oregon Legislature knew that there was a dividing line between the employees covered by the state law and those covered by the federal law. It knew also that in many instances the dividing line is not a clear one, it is cloudy. Neither an employer nor an employee could know whether his employment and his rights for overtime were controlled by state or by federal law. These uncertainties were heightened by the construction placed by the Supreme Court upon the Fair Labor Standards Act extending its coverage to travel time and to activi-

ties which had not been considered in interstate commerce or necessary for the production of goods for interstate commerce. These difficulties are not confined to the operations of the Fair Labor Standards Act. What is work time under the Fair Labor Standards Act, may well be considered work time under the Oregon laws and regulations. A determination of what is intrastate commerce or what is not necessary to produce goods for interstate commerce limits the scope of the Oregon regulations.

Faced with these uncertainties and with these common problems, the legislature well could, and did conclude, that a statute of limitations applicable only to this type of pay should be adopted. The fact that knowledge was gained from experience under the Fair Labor Standards Act did not restrict the power of the Oregon Legislature.

The Administrator and the Appellee again, and again, cite the familiar principle that a state may not, under the guise of asserting its police powers, discriminate in contravention of federal rights and powers. With that principle, we have no quarrel. We fail, however, to see the similarity of a statute prohibiting the importation of meat for sale into a state (*Brimmer v. Rebman,* 138 U. S. 78), to a statute fixing a period of limitations for the institution of suits to collect overtime, whether the overtime be authorized by federal or by state law. The type of discrimination which is banned by the Constitution is clearly illustrated by the case of *McKnett v. St. Louis & San Francisco Railway,* 292 U. S. 230, in which the court held that a state could not deny to a plaintiff the right to sue in a

state court under the Federal Employers' Act while permitting the plaintiff to sue on all other types of action. Such a statute affects the right. The Oregon statute affects the remedy.

We are here not concerned with denial of access to the courts or denial of the right to justice, but with a statute which invites an aggrieved party, and attempts to induce him, to take prompt action to secure redress.

The Administrator seeks to find discrimination against "Federal Rights" in the fact that a different period of limitations applies to causes of action for wages paid under contract. He contends that, because a longer period applies to contractual causes of action, Chapter 265 is invalid. Again we find it impossible to follow him. The distinction between statutory and contractual causes of action, affording a basis of classification for legislative purposes is well supported by the list of statutes set forth as an appendix to the Administrator's Brief. The lists clearly show the generally recognized principle that statutory differ from contractual causes of action. The Administrator's argument, if it be accepted, proves too much. The overtime itself involved in this case is a creature of statute. If that subject matter does not afford a basis for reasonable classification, the statute creating the right to overtime is of doubtful validity. If the legislature may recognize that statutory overtime is a class unto itself, why then, is not a statute concerned only with the enforcement of such a cause of action equally fair and reasonable?

Both the Administrator and Appellee claim to find the invalidity of the statute in the charge that it interferes with the administration of the Fair Labor Standards Act and defeats the purposes of that law. Both claim it deprives an employee of the fair opportunity to have an administrative finding upon his right to overtime pay. In addition the Administrator claims the deterrent effect of Section 16 (b) of the Act is defeated by this statute of limitations. Neither charge is supported by the Act. Congress in enacting the statute provided three independent methods to enforce its provisions. Section 16 (a) makes a violator of certain provisions of the law, upon conviction, subject to fine, imprisonment or both. Section 16 (b) authorizes employee suits. Section 17 permits the Administrator to bring injunction proceedings to restrain violations of certain features of the law. Nowhere is the exercise of one remedy conditioned upon another. Nowhere is the right of an individual employee dependent upon action or non-action by the Administrator. Nor does the statute, in any way condition the exercise by the Administrator of his powers under the Act upon the action or non-action of an individual. Three enforcement powers, each independent of the other, were established by Congress. *Brooklyn Savings Bank v. O'Neill,* 65 Sup. Ct. 895.

The argument therefore that the functioning of the entire Act is frustrated by the limitation of time within which to enforce but one of the several independent remedies furnished by the Act is deceptive and misleading. Particularly is this so when it is remembered that as to the one means of enforcement affected by the Oregon statute, Congress has implicitly consented thereto.

It is urged that the complexities inherent in the statute, its application and construction, making it difficult for an employee to determine his rights, render the Oregon statute unconstitutional. The argument proves too much. If the Administrator's and the Appellee's position in this respect is sound, no state statute of limitations could apply. But both admit that a state statute of limitations fixes the time within which suit must be instituted under the Act. If the argument is sound, the question arises as to what period would be a reasonable one. The Administrator suggests two or three years (Br. p. 15), but he also admits the applicability of the Arizona one year statute. The Act was passed in 1938. It was not until 1945, seven years later, that we knew that a claim for liquidated damages could not be waived. *Brooklyn Savings Bank vs. O'Neill,* supra. It was not until 1945 that we knew (we still are not sure) that the Act did not apply to commercial office buildings. There are still questions unsettled. What is work time? Are employees traveling to and from work in logging camps working within the meaning of the Fair Labor Standards Act? An action involving this question is now pending. It is on appeal to this Court. *Walling v. Smith Wood Products Company.* Must a state wait until the answers to these problems are found before a statute of limitations may have an effect? Is it not sounder to recognize the desirability of an early determination of these problems? Is it not sounder to prescribe a shorter period of limitations, which, in effect forces litigation which will put an end to the complexities of which the Administrator complains?

A statute of limitations of one, two, four or even six years no more provides a solution to these difficult ques-

tions than does one of six months. Seven years after the Act was passed and became effective we now find questions facing us more difficult to solve than those which arose immediately after its enactment. The cure is not in a longer period of limitations, delaying final interpretation of the Act. Rather it is in one forcing prompt action on the part of those claiming to be aggrieved.

The Administrator, as well as Appellee, likewise contends that the administration of the Act is interfered with because an employee, fearing reprisals at the hand of his employer, will not sue to collect his pay until employment is terminated. If this argument is sound (an assumption we do not accept), then the only statute of limitations which the Administrator would recognize as valid, would be one permitting an employee to sue within a specified period after his employment had been terminated. But the Administrator admits a one year statute or a two year statute is valid. The position of the employee, insofar as employer reprisals may be involved, is the same whether he has six months, one year, two years or six years within which to sue. If reprisals are to be inflicted, it is not the time within which the employee sues that induces reprisals. It is the fact that suit is instituted. It is immaterial whether suit be instituted in six days, six months, or six years. The arguments of the Administrator and of the Appellee miss completely the point.

The Administrator and the Appellee complain that forcing the employee to sue within six months denies him access to investigations made by the Administrator's staff. It is claimed that a six months period is too short, as the

Administrator may not make his investigation more frequently than once every two or three years. Again we must confess we are not persuaded by the argument. If the Administrator is as solicitous of the rights of employees as he now appears to be, better service could be done to the workers by more punctual performance of his duties than by asking a longer period of time within which to delay action.

THE COMMERCE CLAUSE

The Appellee and the Administrator point to the familiar doctrine that the commerce clause forbids discrimination against interstate commerce, that State rules will not be permitted to thwart the process of Congressional legislation under the commerce clause. It is then pointed out that the subject matter of the Fair Labor Standards Act is a matter of national concern. The Act, so they say, embodies a comprehensive scheme to prohibit shipment in interstate commerce of products manufacture under substandard labor conditions. All employers are entitled to equality of treatment. From these premises the conclusion is drawn that inasmuch as the Oregon Act is shorter than statutes of other states, there is a lack of uniformity among the state statutes of limitations rendering the Oregon Act unconstitutional. However, it is admitted that each state has the power to prescribe its own period of limitations. It is admitted that the periods prescribed by the various states differ widely. It is admitted by the Administrator that the one year Arizona statute is valid. He points to other states with six year periods of limitations. These

admittedly valid statutes cannot be supported if the position of the Administrator is sound. Uniformity cannot be achieved by permitting forty-eight states to legislate upon the same subject matter. It is true that Congress, as the Supreme Court said in the *Brooklyn Savings Bank case,* achieved some uniformity throughout the United States as to minimum wages rates and overtime provisions. However, Congress did not intend complete uniformity. It destroyed uniformity by exempting various types of industries, such as seamen, carriers subjected to the control of the Interstate Commerce Commission, seasonal industries, agriculture, and the first processing of certain products from the overtime provisions of the Act. By permitting states to prescribe their own statutes of limitations, Congress recognized that nation-wide uniformity in this particular field was not as desirable as the adaptation of the Fair Labor Standards Act procedurally to the local laws of the various states. By so doing, Congress preferred that within each of the states, employee suits under the Fair Labor Standards Act might be enforced uniformly and consistently with actions under State laws of a like character. The complaint of the Administrator and of the Appellee is not to the Oregon Legislature. It is aimed at Congress.

The Administrator and the Appellee speak glibly of statutes burdening interstate commerce, referring to *South Carolina State Highway Dept. v. Barnwell Bros.,* 303 U. S. 177. The Court there held that the South Carolina statute regulating the weight and width of motor trucks using state highways did not unconstitutionally burden inter-

state commerce. The decision is of value for the opinion discloses what is meant by legislation "aimed at interstate commerce" or "is a means of gaining a local benefit by throwing the attendant burdens on those without the state." Said the Court:

> "But the present case affords no occasion for saying that the bare possession of power by Congress to regulate the interstate traffic forces the states to conform to standards which Congress might, but has not adopted . . .
>
> ". . . The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse.
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> * * * * *
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> "In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states.
>
> ". . . When the action of a Legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom, and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision. . . . This is equally the case when the legislative power is one which may legitimately place an incidental burden on interstate commerce. It is not any the less a legislative power committed to the states because it affects interstate commerce, and courts are not any the more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment.

> ". . . The fact that many states have adopted a different standard is not persuasive. . . . The Legislature, being free to exercise its own judgment, is not bound by that of other Legislatures."

The Oregon statute meets these tests. It applies equally to State as well as Federal rights. There is no discrimination.

The Administrator also refers to a statute which "unreasonably interferes with the 'impartial application' of the Federal regulation" citing *Southern Railway v. Reid,* 222 U. S. 424. (Br. p. 16). He misconceives the effect of that decision. The Court there was concerned with a state law imposing a penalty upon railroads refusing to accept goods for transportation. The Court held the State law invalid because it conflicted with the Federal statute. The State law was not unconstitutional because it prevented the "impartial application" of the Federal statute, but because it was in direct conflict with it.

The Court did not hold there must be impartial application of Federal laws. It held that Congress, desiring impartial application of rates of railroads preempted the field. This is clear from the following excerpt from the opinion:

> "By these provisions Congress has taken possession of the field of regulation, with the purpose, which we have already pointed out, to keep under the eye and control of the Commission the rates charged and the action of the railroad in regard to them, to secure their reasonableness and to secure their *impartial application.* The statute of North Carolina conflicts with

> these requirements. What they forbid the carrier to do the statute requires him to do, and punishes disobedience by successive daily penalties." (Italics supplied.)

If Congress, desiring "impartial application" of statutes of limitation to rights created under the Fair Labor Standards Act, had fixed such a period, the case cited would support the Administrator. But Congress did not establish such a period. It did not seek "impartial application" of statutes of limitation. There is no conflict between the State and Federal laws.

There is no interference with commerce if a reasonable time is afforded an employee within which to bring suit. The time is reasonable if it does not fall within the ban of the due process clause. Congress permitted state laws with their lack of uniformity to apply to these causes of action. Having submitted these causes of action to State action, there can be no complaint, if a State, such as Oregon, acts.

A REASONABLE TIME WITHIN WHICH TO SUE

We are in no dispute with the Administrator, or with the Appellee, that, under the due process clause, an employee must be afforded a reasonable time within which to institute action. To support their claims that the period is unreasonable, the Adminstrator summarizes points advanced to support their position attacking the statute upon other grounds. He refers again to his assumption that Congress did not intend that a six months statute should apply.

If Congress did not so intend, it would have been easy for Congress to write its own period of limitations into the statute. Once more reference is made to the employee's fear of reprisals if suit is instituted. That fear exists whether the statute is six months or six years. If it be assumed that there will be reprisals, it is the suit that stimulates them, not the time within which the suit must be brought. Again mention is made of the uncertainties as to the application of coverage of the Act. If we must await final determination of the questions which arise under the Act, then we may safely say that no existing State statute of limitations is valid. The Administrator points out that short periods of limitation for the enforcement of labor liens, in his opinion are no guide for the determination of our problem. However, in the labor lien cases, as in this and other cases involving statuory overtime, an added right is given by statute to an employee in addition to his common law right to recover compensation. The right of the employee is a gratuity given to him by a legislature in the belief that, by so doing, the general welfare better will be served. Such a right bears no relation to his common law claim for compensation. It may well be subjected to a different and a vastly shorter period of limitations.

CONCLUSION

We submit that the issues involved in this case are simple, are not new, and should be so considered. The Administrator and the Appellee have endeavored to confuse the issue by injecting numerous charges of unconstitutionality which do not bear analysis. Congress has consented that

the states may apply their statutes of limitations to rights arising under the Fair Labor Standards Act. Congress has recognized that by so doing the pattern of uniformity will not be extended into this particular feature of the law. By giving its consent, Congress has recognized that there is no interference with the administration of the Fair Labor Standards Act, that there is no discrimination against, or interference with, interstate commerce; and, that there is no discrimination against rights arising under federal law. We submit then that the only question in this case is whether the period permitted by statute is a reasonable one within which to institute action.

Neither the Appellee nor the Administrator have shown why a six months period is unreasonable, but a one year or two year period would be reasonable. Every argument advanced by them applies with equal force to a two year or six year statute. If a six months statute is rendered unconstitutional by the delay of the Administrator in making investigations, a six years statute could be rendered unconstitutional by the same dilatory non-action on his part. Surely constitutionality of a state law does not depend upon the speed with which a federal official performs his duties. The burden is upon those attacking the constitutionality of this statute to show that the period is unreasonable. Not only have they failed to maintain that burden; but, we assert, we have shown that the period is a reasonable one. We submit that the judgment of the trial court should be reversed, and one entered in favor of Appellant.

ANSWER OF CROSS APPELLEE TO BRIEF OF CROSS APPELLANT

Cross Appellant attacks only the portion of the judgment allowing an attorney's fee of $250. He asserts that the intricacies of the question involved, the strenuousness of the opposition encountered and the result achieved are all factors which should be considered. To that we agree. However, an attorney realizes when a suit is brought that opposition may be encountered. Realizing that the constitutionality of this statute would be involved, he must have known that that opposition would be made. However, we think, upon analysis, it will appear clearly that the sole question involved here is whether a reasonable period was accorded Cross Appellant. The fact that the attorney for Cross Appellant has seen fit to confuse the case, and to inject intricate questions having no pertinence are factors to be considered in fixing a reasonable fee.

Respectfully submitted,

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